

***US Department of Transportation Order
on Environmental Justice***



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[Notices]

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[OST Docket No. OST-95-141 (50125)]

Department of Transportation (DOT) Order To Address Environmental
Justice in Minority Populations and Low-Income Populations

AGENCY: Departmental Office of Civil Rights and Office of the Assistant
Secretary for Transportation Policy, DOT.

ACTION: Notice of final DOT Order on environmental justice.

SUMMARY: The Department of Transportation is issuing its final DOT Order, which will be used by DOT to comply with Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. The Order generally describes the process that the Office of the Secretary and each Operating Administration will use to incorporate environmental justice principles (as embodied in the Executive Order) into existing programs, policies, and activities. The Order provides that the Office of the Secretary and each Operating Administration within DOT will develop specific procedures to incorporate the goals of the DOT Order and the Executive Order with the programs, policies and activities which they administer or implement.

FOR FURTHER INFORMATION CONTACT: Ira Laster Jr., Office of Environment, Energy, and Safety, Office of the Assistant Secretary for Transportation Policy, (202) 366-4859, or Marc Brenman, Departmental Office of Civil Rights, (202) 366-1119, U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION: Executive Order 12898, as well as the President's February 11, 1994 Memorandum on Environmental Justice (sent to the heads of all departments and agencies), are intended to ensure that Federal departments and agencies identify and address disproportionately high and adverse human health or environmental effects of their policies, programs and activities on minority populations and low-income populations.

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The DOT Environmental Justice Order is a key component of DOT's June 21, 1995 Environmental Justice Strategy (60 FR 33896). The Order sets forth a process by which DOT and its Operating Administrations will integrate the goals of the Executive Order into their operations. This is to be done through a process developed within the framework of existing requirements, primarily the National Environmental Policy Act (NEPA), Title VI of the Civil Rights Act of 1964 (Title VI), the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (URA), the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), and other DOT applicable statutes, regulations and guidance that concern planning; social, economic, or environmental matters; public health or welfare; and public involvement. The Order is an internal directive to the various components of DOT and does not create any right to judicial review for compliance or noncompliance with its provisions.

In order to provide an opportunity for public input, a proposed version of this Order was published for comment on June 29, 1995 (60 FR 33899). A total of 30 written comments were received. Fifteen comments were received from state transportation or highway agencies, representing 20 state agencies (one letter was signed by ten state agencies, but four of those also sent individual comments). The other 15 comments included four from transit agencies, four from national organizations, two each from local governments, metropolitan planning organizations, and citizens objecting to one particular project, and one from a professional association.

Most of the comments from the state agencies suggested that the proposed Order would duplicate existing processes and impose additional burdens on the state agencies, and urged that greater flexibility be granted to states.

The DOT Order reinforces considerations already embodied in NEPA and Title VI, and the final version has been revised to make this clearer. It is intended to insure that a process for the assessment of environmental justice factors becomes common practice in the application of those, and related, statutes.

Many other comments suggested ways in which the Order might be clarified or simplified, or addressed specific details of individual

agency implementation. As this Order is only intended to provide general guidance to all DOT components, detailed comments on each agency's implementation are premature, and should be made during opportunities for public input on agency implementation (para. 5 of the Order).

Several commenters suggested greater reliance on existing procedures, particularly those implementing NEPA.

One commenter noted, "Over the past number of years we have seen rules and laws initiated with laudable intent, only to be slowly transformed into bureaucratic mazes only dimly related to their original purpose."

The Department does not intend that this Order be the first step in creating a new set of requirements. The objective of this Order is the development of a process that integrates the existing statutory and regulatory requirements in a manner that helps ensure that the interests and well being of minority populations and low-income populations are considered and addressed during transportation decision making.

To further advance this objective, explanatory information has been provided in this preamble and several changes have been made in the Order. Most notably:

--Further clarification has been provided concerning the use of existing NEPA, Title VI, URA and ISTEA planning requirements and procedures to satisfy the objectives of Executive Order 12898.

--The application of the Order to ongoing activities is discussed in this preamble.

--The Order has been modified to further clarify the relationship and use of NEPA and Title VI in implementing the Executive Order.

Further, in developing and reviewing implementing procedures, described in paragraph 5a to comply with Executive Order 12898, the emphasis continues to be on the actual implementation of NEPA, Title VI, the URA and ISTEA planning requirements so as to prevent disproportionately high and adverse human health or **environmental** effects of DOT's programs, policies and activities on minority populations and low-income populations.

One of the primary issues raised in the proposed Order concerned the actions that would be taken if a disproportionately high and adverse human health or **environmental** effect on minority populations or low-income populations is identified. The proposed Order set forth three options. A variety of comments were received on this issue, both for and against the various options.

The final Order adopts a modified version of Option B from the proposed Order. While Option B implements a new process for addressing disproportionately high and adverse effects, the Department believes

that Option B is consistent with existing law and best accomplishes the objectives of the Executive Order. Option B (now incorporated in paragraphs 8a, 8b and 8c of the final Order) provides that disproportionate impacts on low-income and minority populations are to be avoided, if practicable, that is, unless avoiding such disproportionate impacts would result in significant adverse impacts on other important social, economic, or environmental resources. Further, populations protected by Title VI are covered by the additional provisions of paragraph 8b. Three commenters expressed concern and uncertainty as to the implementation of paragraph 6b(1) of Option B as proposed, that provided for an agreement with populations protected by Title VI. DOT agreed with the comments and, accordingly, that paragraph has been deleted from the final Order.

Several commenters asked about the effective date of this Order. In particular they wanted to know whether it applies to ongoing projects. The effective date of the Order is the date of its issuance. However, to the extent that the Order clarifies existing requirements that ensure environmental justice principles are considered and addressed before final transportation decisions are made, its purposes already should be reflected in actions relating to ongoing projects.

Several commenters recommended that insignificant or de minimis actions not be covered by this Order. It is noted that the definition of "programs, policies and/or activities" in Section 1f of the Appendix does not apply to those actions that do not affect human health or the environment. Other actions that have insignificant effects on human health or the environment can be excluded from coverage by a DOT component.

One commenter suggested that this Order might be inconsistent with the Supreme Court's decision in *Adarand Constructors v. Peña*. DOT has concluded that, since the purpose of this Order is unrelated to the types of programs which were the subject of *Adarand*, this Order is not affected by the *Adarand* decision.

Dated: February 3, 1997.
Federico F. Pena,
Secretary of Transportation.

Department of Transportation, Office of the Secretary, Washington,
D.C.

Order

Subject: Department of Transportation Actions To Address **Environmental**

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Justice in Minority Populations and Low-Income Populations

1. Purpose and Authority

a. This Order establishes procedures for the Department of Transportation (DOT) to use in complying with Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, dated February 11, 1994. Relevant definitions are in the Appendix.

b. Executive Order 12898 requires each Federal agency, to the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, to achieve environmental justice as part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of its programs, policies, and activities on minority populations and low-income populations in the United States. Compliance with this DOT Order is a key element in the environmental justice strategy adopted by DOT to implement the Executive Order, and can be achieved within the framework of existing laws, regulations, and guidance.

c. Consistent with paragraph 6-609 of Executive Order 12898, this Order is limited to improving the internal management of the Department and is not intended to, nor does it, create any rights, benefits, or trust responsibility, substantive or procedural, enforceable at law or equity, by a party against the Department, its operating administrations, its officers, or any person. Nor should this Order be construed to create any right to judicial review involving the compliance or noncompliance with this Order by the Department, its operating administrations, its officers or any other person.

2. Scope

This Order applies to the Office of the Secretary, the United States Coast Guard, DOT's operating administrations, and all other DOT components.

3. Effective Date

This Order is effective upon its date of issuance.

4. Policy

a. It is the policy of DOT to promote the principles of environmental justice (as embodied in the Executive Order) through the incorporation of those principles in all DOT programs, policies, and activities. This will be done by fully considering environmental justice principles throughout planning and decision-making processes in the development of programs, policies, and activities, using the principles of the National Environmental Policy Act of 1969 (NEPA), Title VI of the Civil Rights Act of 1964 (Title VI), the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (URA), the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and other DOT statutes, regulations and

guidance that address or affect infrastructure planning and decisionmaking; social, economic, or environmental matters; public health; and public involvement.

b. In complying with this Order, DOT will rely upon existing authority to collect data and conduct research associated with environmental justice concerns. To the extent permitted by existing law, and whenever practical and appropriate to assure that disproportionately high and adverse effects on minority or low income populations are identified and addressed, DOT shall collect, maintain, and analyze information on the race, color, national origin, and income level of persons adversely affected by DOT programs, policies, and activities, and use such information in complying with this Order.

5. Integration With Existing Operations

a. The Office of the Secretary and each operating administration shall determine the most effective and efficient way of integrating the processes and objectives of this Order with their existing regulations and guidance. Within six months of the date of this Order each operating administration will provide a report to the Assistant Secretary for Transportation Policy and the Director of the Departmental Office of Civil Rights describing the procedures it has developed to integrate, or how it is integrating, the processes and objectives set forth in this Order into its operations.

b. In undertaking the integration with existing operations described in paragraph 5a, DOT shall observe the following principles:

(1) Planning and programming activities that have the potential to have a disproportionately high and adverse effect on human health or the environment shall include explicit consideration of the effects on minority populations and low-income populations. Procedures shall be established or expanded, as necessary, to provide meaningful opportunities for public involvement by members of minority populations and low-income populations during the planning and development of programs, policies, and activities (including the identification of potential effects, alternatives, and mitigation measures).

(2) Steps shall be taken to provide the public, including members of minority populations and low-income populations, access to public information concerning the human health or environmental impacts of programs, policies, and activities, including information that will address the concerns of minority and low-income populations regarding the health and environmental impacts of the proposed action.

c. Future rulemaking activities undertaken pursuant to DOT Order 2100.5 (which governs all DOT rulemaking), and the development of any future guidance or procedures for DOT programs, policies, or activities that affect human health or the environment, shall address compliance with Executive Order 12898 and this Order, as appropriate.

d. The formulation of future DOT policy statements and proposals for legislation which may affect human health or the environment will

include consideration of the provisions of Executive Order 12898 and this Order.

6. Ongoing DOT Responsibility

Compliance with Executive Order 12898 is an ongoing DOT responsibility. DOT will continuously monitor its programs, policies, and activities to ensure that disproportionately high and adverse effects on minority populations and low-income populations are avoided, minimized or mitigated in a manner consistent with this Order and Executive Order 12898. This Order does not alter existing assignments or delegations of authority to the Operating Administrations or other DOT components.

7. Preventing Disproportionately High and Adverse Effects

a. Under Title VI, each Federal agency is required to ensure that no person, on the ground of race, color, or national origin, is excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity receiving Federal financial assistance. This statute affects every program area in DOT. Consequently, DOT managers and staff must administer their programs in a manner to assure that no person is excluded from participating in, denied the benefits of, or subjected to discrimination by any program or

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activity of DOT because of race, color, or national origin.

b. It is DOT policy to actively administer and monitor its operations and decision making to assure that nondiscrimination is an integral part of its programs, policies, and activities. DOT currently administers policies, programs, and activities which are subject to the requirements of NEPA, Title VI, URA, ISTEA and other statutes that involve human health or environmental matters, or interrelated social and economic impacts. These requirements will be administered so as to identify, early in the development of the program, policy or activity, the risk of discrimination so that positive corrective action can be taken. In implementing these requirements, the following information should be obtained where relevant, appropriate and practical:

--Population served and/or affected by race, color or national origin, and income level;

--Proposed steps to guard against disproportionately high and adverse effects on persons on the basis of race, color, or national origin;

--present and proposed membership by race, color, or national origin, in any planning or advisory body which is part of the program.

c. Statutes governing DOT operations will be administered so as to identify and avoid discrimination and avoid disproportionately high and adverse effects on minority populations and low-income populations by:

(1) identifying and evaluating environmental, public health, and interrelated social and economic effects of DOT programs, policies and activities,

(2) proposing measures to avoid, minimize and/or mitigate disproportionately high and adverse environmental and public health effects and interrelated social and economic effects, and providing offsetting benefits and opportunities to enhance communities, neighborhoods, and individuals affected by DOT programs, policies and activities, where permitted by law and consistent with the Executive Order,

(3) considering alternatives to proposed programs, policies, and activities, where such alternatives would result in avoiding and/or minimizing disproportionately high and adverse human health or environmental impacts, consistent with the Executive Order, and

(4) eliciting public involvement opportunities and considering the results thereof, including soliciting input from affected minority and low-income populations in considering alternatives.

8. Actions To Address Disproportionately High and Adverse Effects

a. Following the guidance set forth in this Order and its Appendix, the head of each Operating Administration and the responsible officials for other DOT components shall determine whether programs, policies, and activities for which they are responsible will have an adverse impact on minority and low-income populations and whether that adverse impact will be disproportionately high.

b. In making determinations regarding disproportionately high and adverse effects on minority and low-income populations, mitigation and enhancements measures that will be taken and all offsetting benefits to the affected minority and low-income populations may be taken into account, as well as the design, comparative impacts, and the relevant number of similar existing system elements in non-minority and non-low-income areas.

c. The Operating Administrators and other responsible DOT officials will ensure that any of their respective programs, policies or activities that will have a disproportionately high and adverse effect on minority populations or low-income populations will only be carried out if further mitigation measures or alternatives that would avoid or reduce the disproportionately high and adverse effect are not practicable. In determining whether a mitigation measure or an alternative is "practicable," the social, economic (including costs) and environmental effects of avoiding or mitigating the adverse effects will be taken into account.

d. Operating Administrators and other responsible DOT officials will also ensure that any of their respective programs, policies or

activities that will have a disproportionately high and adverse effect on populations protected by Title VI ("protected populations") will only be carried out if:

(1) a substantial need for the program, policy or activity exists, based on the overall public interest; and

(2) alternatives that would have less adverse effects on protected populations (and that still satisfy the need identified in subparagraph (1) above), either (i) would have other adverse social, economic, environmental or human health impacts that are more severe, or (ii) would involve increased costs of extraordinary magnitude.

e. DOT's responsibilities under Title VI and related statutes and regulations are not limited by this paragraph, nor does this paragraph limit or preclude claims by individuals or groups of people with respect to any DOT programs, policies, or activities under these authorities. Nothing in this Order adds to or reduces existing Title VI due process mechanisms.

f. The findings, determinations and/or demonstration made in accordance with this section must be appropriately documented, normally in the environmental impact statement or other NEPA document prepared for the program, policy or activity, or in other appropriate planning or program documentation.

Appendix

1. Definitions

The following terms where used in this Order shall have the following meanings *:

a. DOT means the Office of the Secretary, DOT operating administrations, and all other DOT components.

b. Low-Income means a person whose median household income is at or below the Department of Health and Human Services poverty guidelines.

c. Minority means a person who is:

(1) Black (a person having origins in any of the black racial groups of Africa);

(2) Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race);

(3) Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands); or

(4) American Indian and Alaskan Native (a person having origins in any of the original people of North America and who maintains cultural identification through tribal affiliation or community recognition).

d. Low-Income Population means any readily identifiable group of low-income persons who live in geographic proximity, and, if circumstances warrant, geographically dispersed/transient persons (such

as migrant workers or Native Americans) who will be similarly affected by a proposed DOT program, policy or activity.

e. Minority Population means any readily identifiable groups of minority persons who live in geographic proximity, and if circumstances warrant, geographically dispersed/transient persons (such as migrant workers or Native Americans) who will be similarly affected by a proposed DOT program, policy or activity.

f. Adverse effects means the totality of significant individual or cumulative

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human health or environmental effects, including interrelated social and economic effects, which may include, but are not limited to: bodily impairment, infirmity, illness or death; air, noise, and water pollution and soil contamination; destruction or disruption of man-made or natural resources; destruction or diminution of aesthetic values; destruction or disruption of community cohesion or a community's economic vitality; destruction or disruption of the availability of public and private facilities and services; vibration; adverse employment effects; displacement of persons, businesses, farms, or nonprofit organizations; increased traffic congestion, isolation, exclusion or separation of minority or low-income individuals within a given community or from the broader community; and the denial of, reduction in, or significant delay in the receipt of, benefits of DOT programs, policies, or activities.

g. Disproportionately high and adverse effect on minority and low-income populations means an adverse effect that:

(1) is predominately borne by a minority population and/or a low-income population, or

(2) will be suffered by the minority population and/or low-income population and is appreciably more severe or greater in magnitude than the adverse effect that will be suffered by the non-minority population and/or non-low-income population.

h. Programs, policies, and/or activities means all projects, programs, policies, and activities that affect human health or the environment, and which are undertaken or approved by DOT. These include, but are not limited to, permits, licenses, and financial assistance provided by DOT. Interrelated projects within a system may be considered to be a single project, program, policy or activity for purposes of this Order.

i. Regulations and guidance means regulations, programs, policies, guidance, and procedures promulgated, issued, or approved by DOT.

* These definitions are intended to be consistent with the draft definitions for E.O. 12898 that have been issued by the Council on

Environmental Quality and the Environmental Protection Agency. To the extent that these definitions vary from the CEQ and EPA draft definitions, they reflect further refinements deemed necessary to tailor the definitions to fit within the context of the DOT program.

Federico F. Pena,

Secretary of Transportation.

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United States Department of Transportation - **Federal Highway Administration**
